United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1288

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To be argued by
MICHAEL C. EBERHARDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1288

UNITED STATES OF AMERICA,
Appellant,

—v.—

HERBERT YAGID,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

ARGUMENT

Dismissal without prejudice was within Judge Brieant's discretion.

In Point IV of his brief, Yagid argues that Judge Brieant's decision was error, not because, as the Government contends, the indictment should not have been dismissed, but rather on the ground that Judge Brieant's dismissal was wrongly without prejudice. This Court need not reach this contention because, we submit, the indictment should not have been dismissed at all for the reasons already stated in our main brief. Moreover, since Yagid has withdrawn his appeal (see Exhibit 1 to Yagid's Brief), it seems clear that he is foreclosed from attacking Judge Brieant's decision on the ground he asserts.

However, on the merits it is clear that Judge Brieant was well within his discretion in declining to dismiss the indictment with prejudice, assuming, contrary to the reasons expressed in the Government's main brief, that it should have been dismissed at all. While such cases as *Hilbert* v. *Dooling*, 476 F.2d 355 (2d Cir.) (*en banc*), *cert. denied*, 414 U.S. 878 (1973), on which Yagid relies, affirm an intent to enact rules for the prompt trial of criminal cases with the sanction for non-compliance of dismissal with prejudice, that case dealt with the purposes underlying the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases and, specifically, Rule 4. However, this case arises under Rule 6 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases, which, under Rule 50(b) of the Federal Rules of Criminal Procedure, has superseded the quite different Rule 6 in the Second Circuit Rules. Moreover, while this Court has suggested that it is "difficult to imagine" an "effective" District Court plan under Rule 50(b) "without the sanction of dismissal with prejudice", *United States* v. *Furey*, 514 F.2d 1098, 1105 (2d Cir. 1975), the Court in *Furey* also recognized that the proper inquiry is whether ". . . the District Court in question found that this sanction was necessary to the effectiveness of its plan." *Id.* at 1106. We respectfully submit, as Judge Brieant held below, that the Judges of the District Court for the Southern District of New York did not intend to require dismissal with prejudice for failure to comply with Rule 6 of the Southern District Plan in the circumstances this case presents.

It is clear that Rule 6 of the District Court plans in this Circuit is a unique departure from prior law in several respects. First, as this Court has recognized, the District Court version of Rule 6 requires a retrial within 90 days from the finality of the order directing such a retrial, while the earlier Second Circuit Rules simply required that the Government be ready for retrial as it

had to be for trial within the period fixed by Rule 4 of those Rules. *United States* v. *Drummond*, 511 F.2d 1049, 1052 (2d Cir. 1975). Second, as this Court likewise noted in *Drummond*, 511 F.2d at 1053, Rule 6 of the District Court plans do ". . . not mention any sanction for failure to comply with it. . ." In contrast, such cases as *Hilbert* and *Furey* dealt with dismissals under Rule 4 of the Second Circuit Rules and the District Court plans respectively, and both versions of Rule 4 provide for dismissal with prejudice, the latter *in haec verba* and the former by construction in *Hilbert*, though the Rule was always clear that dismissal of some sort was required.

Accordingly, it is hardly unreasonable to suppose that the District Court, in promulgating requirements under Rule 6 that went far beyond what the Second Circuit Rules had demanded or other aspects of the Southern District Plan require, intended, as Judge Brieant found, that non-compliance would not necessarily require dismissal with prejudice; indeed, in view of the specific provision for the sanction of dismissal with prejudice in the less stringent Rule 4 of the Southern District Plan, it seems clear that the District Court's omission of such a sanction in Rule 6 was not the result of oversight. Furthermore, given the fact that compliance with the version of Rule 6 in the District Plan is not within the Government's control, as it was under the Second Circuit's predecessor Rule 6 and has always been under Rule 4, it seems clear that the Southern District Court, in enacting Rule 6 in its present form, intended to leave the form of dismissal within the discretion of the trial judge in each case where a claim under Rule 6 was raised. Such a view is entirely consistent with this Court's decision in *Furey*, 514 F.2d at 1103-1104, which holds that District Court plans under Rule 50(b) codify the discretion of the District Court under Rule 48(b), a discretion to dismiss with prejudice or without prejudice as circumstances may

make appropriate. In this case, given the novel and stringent provisions of Rule 6, authoritatively construed only recently in *Drummond*, the good-faith and persistent efforts of the Government to bring the case on for retrial, the defeat of those efforts by factors outside the Government's control, the absence of similar efforts on Yagid's part, and the total want of a showing of prejudice from the hardly extensive delay in this case, we respectfully submit that it was within a discretion the Southern District Plan vests in trial judges for Judge Brieant to dismiss the indictment without prejudice, assuming that this Court is of the view, despite the arguments in the Government's main brief, that the indictment should have been dismissed at all.

CONCLUSION

The order of the District Court dismissing the indictment should be reversed.

Respectfully submitted,

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MICHAEL C. EBERHARDT,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL C. EBERHARDT being duly sworn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 19th day of September 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

HERBERT YAGID
177 RARITAN ROAD
CRANFORD, NEW JERSEY 07016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael Eberhardt

Sworn to before me this
19th day of September, 1975
Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977